

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	
DR. HENRY ERLE CHILDERS, et al.,	:
On Behalf Of Themselves Individually	:
And All Others Similarly Situated,	:
	:
Plaintiffs,	:
v.	:
	:
THE NEW YORK AND PRESBYTERIAN	:
HOSPITAL,	:
	:
Defendant.	:
-----X	

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION  
TO MOTION TO DISMISS THE COMPLAINT**

Steven K. Barentzen  
PCT LAW GROUP, PLLC  
1575 Eye Street, NW, Suite 300  
Washington, DC 20005  
T: (202) 289.4333  
F: (202) 289.8450  
sbarentzen@pctlg.com

*Attorneys for Plaintiffs*

**TABLE OF CONTENTS**

I.	PRELIMINARY STATEMENT.....	1
II.	FACTS.....	4
	A. General Background on Medical Residency Programs.....	4
	B. The Medical Residency Program at NYPH.....	6
	C. FICA Tax and the Student Exception.....	8
	D. Defendant’s Wrongdoing.....	10
III.	ARGUMENT.....	12
	1. The Applicable Legal Standard.....	12
	2. The Court Has Subject Matter Jurisdiction Over Plaintiffs’ Claims .....	13
	3. Plaintiffs Have Stated Plausible Claims.....	17
	A. Plaintiffs Have Stated Plausible Breach of Fiduciary Duty Claims...	17
	B. Plaintiffs Have Stated Plausible Negligence Claims.....	21
	C. Plaintiffs Have Stated Plausible Fraud Claims.....	23
	i. Special Relationship.....	23
	ii. The Special Facts Doctrine.....	23
	D. Plaintiffs Have Stated Plausible Breach of Contract Claims .....	24
	E. Plaintiffs Have Stated Plausible Constructive Fraud Claims .....	28
	F. Stated Plausible Negligent Misrepresentation Claims .....	29
	G. Plaintiffs Have Stated Plausible Unjust Enrichment Claims .....	31
	4. Plaintiffs’ Claims Are Timely .....	32
IV.	CONCLUSION.....	36

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Abbas v. Dixon</i> , 480 F.3d 636 (2d Cir. 2007).....	32
<i>Albany Med. Ctr. v. U.S.</i> , 2006 WL 4573714 (N.D.N.Y. 2006).....	11
<i>Alfaro v. Wal-Mart Stores, Inc.</i> , 210 F.3d 111 (2d Cir. 2000) .....	21
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	13
<i>Atlantic Dept. Stores, Inc. v. U.S.</i> , 557 F.2d 957 (2d Cir. 1977) .....	8, 9 26
<i>Aventine Inv. Mgmt. v. Canadian Imperial Bank of Commerce</i> , 265 A.D.2d 513 (2d Dep't 1999) .....	28
<i>Bano v. Union Carbide Corp.</i> , 361 F.3d 696 (2d Cir. 2004) .....	32
<i>Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank</i> , 57 F.3d 146 (2d Cir.1995) .....	25
<i>Barron Partners, LP v. LAB123, Inc.</i> , 593 F. Supp. 2d 667 (S.D.N.Y. 2009) .....	24
<i>Bell Atl. Corp v. Twombly</i> , 550 U.S. 544 (2007) .....	13
<i>Beneficial Commercial Corp. v. Murray Glick Datsun, Inc.</i> , 601 F. Supp. 770 (S.D.N.Y.1985) .....	24
<i>Brass v. American Film Technologies, Inc.</i> , 987 F.2d 142 (2d Cir. 1993) .....	17, 18
<i>Brennan v. Sw. Airlines Co.</i> , 134 F.3d 1405 (9th Cir. 1998) .....	16
<i>Brooklyn Union Gas Co. v. Hunter Turbo Corp.</i> , 241 A.D.2d 505 (2d Dep't 1997) .....	32, 33
<i>Burrell v. State Farm &amp; Cas. Co.</i> , 226 F. Supp. 2d 427 (S.D.N.Y. 2002) .....	29

<i>Carrillo v. Kreckel</i> , 352 N.Y.S.2d 730 (N.Y. Sup. Ct. 1974) .....	21
<i>Century Pac., Inc. v. Hilton Hotels Corp.</i> , 2004 WL 868211 (S.D.N.Y. 2004) .....	30
<i>Chambers v. Time Warner, Inc.</i> , 282 F.3d 147 (2d Cir. 2002) .....	13
<i>Chiarella v. U.S.</i> , 445 U.S. 222 (1980) .....	24
<i>Chmiel v. Potter</i> , 2010 WL 5904384 (W.D.N.Y. 2010) .....	33
<i>Dalton v. Educational Testing Serv.</i> , 639 N.Y.S.2d 977 (N.Y. 1995) .....	28, 29
<i>Davidson v. Henkel Corp.</i> , 2013 WL 3863981 (E.D. Mich. 2013) .....	15
<i>Davis v. Indiana State Police</i> , 541 F.3d 760 (7th Cir. 2008) .....	32
<i>Donovan v. Aeolian Co.</i> , 270 N.Y. 267 (N.Y. 1936) .....	25
<i>Ellington Credit Fund, LTD. v. Select Portfolio Servicing, Inc.</i> , 837 F. Supp. 2d 162 (S.D.N.Y. 2011) .....	17
<i>Faulkner v. Beer</i> , 463 F.3d 130 (2d Cir. 2006) .....	13
<i>Flickinger v. Harold C. Brown &amp; Co.</i> , 947 F.2d 595 (2d Cir. 1991) .....	17
<i>Gaines Service Leasing Corp. v. Carmel Plastic Corp.</i> , 432 N.Y.S.2d 760 (N.Y. Civ. Ct. 1980) .....	24
<i>Gleason v. Spota</i> , 194 A.D.2d 764 (2d Dep't 1993) .....	34
<i>Golek v. Saint Mary's Hosp., Inc.</i> , 34 A.3d 452 (Conn. App. 2012).....	19

<i>Harris v. City of New York</i> , 186 F.3d 243 (2d Cir. 1999) .....	31
<i>Heineman v. S &amp; S Machinery Corp.</i> , 750 F. Supp. 1179 (E.D.N.Y. 1990) .....	27
<i>Hughes Aircraft Co. v. Jacobson</i> , 525 U.S. 432 (1999) .....	15
<i>Hydro Investors, Inc. v. Trafalgar Power, Inc.</i> , 227 F.3d 8 (2d Cir. 2000) .....	29
<i>In re Air Transp. Excise Tax Litig.</i> , 37 F. Supp. 2d 1133 (D. Minn. 1999) .....	16
<i>In re marchFIRST Inc.</i> , 589 F.3d 901 (7th Cir. 2009) .....	32
<i>In re Valley Mortgage, Inc.</i> , 2013 WL 5314369 (Bankr. D. Co. 2013).....	16
<i>Jung v. Ass'n of Am. Med. Colls.</i> , 339 F. Supp. 2d 26 (D.D.C. 2004) .....	5
<i>Jung v. Ass'n of Am. Med. Colls.</i> , 300 F. Supp. 2d 119 (D.D.C. 2004) .....	5
<i>Kaucky v. Sw. Airlines Co.</i> , 109 F.3d 349 (7th Cir. 1997) .....	16
<i>Kaufman v Cohen</i> , 307 A.D. 2d 113 (1st Dep't 2003) .....	33
<i>Kaye v. Grossman</i> , 202 F.3d 611 (2d Cir. 2000) .....	31
<i>Kimmell v. Schaefer</i> , 89 N.Y.2d 257 (N.Y. 1996) .....	30
<i>King County v. IKB Deutsche Industriebank AG</i> , 863 F. Supp. 2d 288 (S.D.N.Y. 2012) .....	30
<i>Lerner v. Fleet Bank, N.A.</i> , 459 F.3d 273 (2d Cir. 2006) .....	23
<i>Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.</i> , 388 F. Supp. 2d 292 (S.D.N.Y. 2005) .....	18

<i>Mandelblatt v. Devon Stores, Inc.</i> , 132 A.D.2d 162 (1st Dep't 1987) .....	17
<i>Matthew v. RCN Corp.</i> , 2012 WL 5834917 (S.D.N.Y. 2012) .....	16
<i>Mayo Found. For Med. Educ. And Research v. U.S.</i> , 131 S. Ct. 441468 (2011) .....	4
<i>McDonald's Corp. v. Hinksman</i> , 1999 WL 441468 (E.D.N.Y. 1999) .....	29
<i>McIvor v. Di Benedetto</i> , 121 A.D.2d 519 (2d Dep't 1986) .....	35
<i>Michael G. v. Athletic Alliance Risk Purch. Group</i> , 747 N.Y.S.2d 884 (N.Y. Sup., Nassau County 2002) .....	22
<i>Mikulski v. Centerior Energy Corp.</i> , 501 F.3d 555 (6th Cir.2007) .....	15
<i>Mills v. M.A.B.S.T.O.A.</i> , 1988 WL 132848 (S.D.N.Y. 1988) .....	14, 16
<i>Mills v. U.S.</i> , 890 F.2d 1133 (11th Cir. 1989) .....	2, 8, 19, 20
<i>Minnesota v. Kenneth S. Apfel, Comm'r of Soc. Sec.</i> , 151 F.3d 742 (8th Cir. 1998) .....	9
<i>Morgan Stanley &amp; Co. Inc. v. JP Morgan Chase Bank, N.A.</i> , 645 F. Supp. 2d 248 (S.D.N.Y. 2009) .....	21, 22
<i>Musalli Factory for Gold &amp; Jewelry v. JPMorgan Chase Bank, N.A.</i> , 261 F.R.D. 13 (S.D.N.Y. 2009) .....	18, 30
<i>Nallan v. Helmsley-Spear, Inc.</i> , 50 N.Y.2d 507 (N.Y. 1980) .....	22
<i>P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.</i> , 301 A.D.2d 373 (1st Dep't 2003) .....	25
<i>Parvi v. City of Kingston</i> , 41 N.Y.2d 553 (1977) .....	22
<i>Pearl v. City of Long Beach</i> , 296 F.3d 76 (2d Cir. 2002) .....	34

<i>Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Amer.</i> , 446 F. Supp. 2d 163 (S.D.N.Y. 2006) .....	17, 18
<i>Peralta–Taveras v. Gonzales</i> , 488 F.3d 580 (2d Cir. 2007) .....	15
<i>Powers v. St. John's Univ. School of Law</i> , 110 A.D.3d 888 (2d Dep't 2013).....	28
<i>Ryan v. Univ. of N.C. Hosps.</i> , 609 S.E.2d 498 (N.C. App. 2005) .....	19
<i>Schirano v. Paggioli</i> , 99 A.D.2d 802 (2d Dep't 1984) .....	35
<i>Serdarevic v. Advanced Medical Optics, Inc.</i> , 532 F.3d 1352 (Fed. Cir. 2008) .....	33
<i>Sigmon v. Sw. Airlines Co.</i> , 110 F.3d 1200 (5th Cir. 1997) .....	16
<i>Snyder v. Town Insulation, Inc.</i> , 81 N.Y.2d 429 (N.Y. 1993) .....	33
<i>St. John's Univ. v. Bolton</i> , 757 F. Supp. 2d 144 (S.D.N.Y. 2010) .....	17, 35
<i>Statistical Phone Philly v. NYNEX Corp.</i> , 116 F. Supp. 2d 468 (S.D.N.Y.2000) .....	34
<i>Statler v. Dell Inc.</i> , 775 F.Supp.2d 474 (E.D.N.Y. 2011) .....	34
<i>Swersky v Dreyer &amp; Traub</i> , 219 A.D.2d 321 (1st Dep't 1996) .....	25
<i>Torre v. Columbia Univ.</i> , 1998 WL 386438 (S.D.N.Y. 1998) .....	34
<i>Travellers Int'l, A.G. v. Trans World Airlines, Inc.</i> , 41 F.3d 1570 (2d Cir.1994) .....	28
<i>U.S. v. Allen</i> , 1992 WL 437652 (N.D. Oh. 1992) .....	20
<i>U.S. v. Clintwood Elkhorn Min. Co.</i> , 553 U.S. 1 (2008) .....	16

<i>U.S. v. Memorial Sloan-Kettering Cancer Ctr.</i> , 563 F.3d 19 (2d Cir. 2009) .....	4, 6
<i>U.S. v. Mount Sinai Med. Ctr. of Fl., Inc.</i> , 353 F. Supp. 2d 1217 (S.D. Fl. 2005) .....	7, 8, 10
<i>U.S. v. Mount Sinai Med. Ctr. of Fl.</i> , 2008 WL 2940669 (S.D. Fl. 2008).....	passim
<i>UniCredito Italiano SPA v. JPMorgan Chase Bank</i> , 288 F. Supp. 2d 485 (2d Cir. 1995) .....	23, 25
<i>United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.</i> , 216 F. Supp. 2d 198 (S.D.N.Y. 2002) .....	17
<i>Univ. of Utah v. U.S.</i> , 2008 WL 4534179 (D. Utah 2008) .....	9, 11
<i>Wolf v. City of New York</i> , 39 N.Y.2d 568 (N.Y. 1976) .....	22
<i>Woods v. Maytag Co.</i> , 807 F. Supp. 2d 112 (E.D.N.Y. 2011) .....	23
<i>Zumpano v. Quinn</i> , 816 N.Y.S.2d 703 (N.Y. 2006) .....	34

## STATUTES

26 U.S.C. § 7422 .....	13, 14
------------------------	--------

## RULES

Fed. R. Civ. P. 12 (b)(6) .....	12
---------------------------------	----

## OTHER AUTHORITIES

Restatement (Second) of Torts § 551(2)(a) (1976) .....	24
William L. Prosser, Handbook of the Law of Torts (4th ed.1971) .....	21, 24



**REDACTED PURSUANT TO COURT ORDER**

**DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER**

**DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER**

**DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER**

**DATED DECEMBER 13, 2013**



**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER**

**DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**



**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER**

**DATED DECEMBER 13, 2013**



**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**



**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

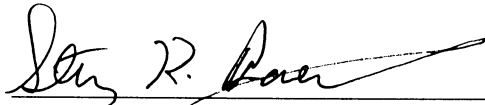
**REDACTED PURSUANT TO COURT ORDER  
DATED DECEMBER 13, 2013**

**CONCLUSION**

For these reasons Plaintiffs respectfully request that the Court issue an order denying Defendant's Motion to Dismiss.

Dated: December 6, 2013

PCT LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "Steven K. Barentzen", is written over a horizontal line.

Steven K. Barentzen

1575 Eye Street, NW, Suite 300

Washington, DC 20005

T: (202) 289.4333

F: (202) 289.8450

sbarentzen@pctlg.com

*Attorneys for Plaintiffs*